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CONFERENCE OF STATE AND LOCAL BAR ASSOCIATIONS.

Organized 1917.

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President of the Massachusetts Bar Association:

DEAR SIR: The Conference of State and Local Bar Association Delegates held at Cleveland on the 27th of August, 1918, was most successful. Thirty-two States and two Canadian Provinces were represented. Twenty-eight State bar associations and fifty-five local bar associations were represented, and one hundred and nineteen delegates constituted the Conference. The Bulletin of the Conference, containing the full record of the proceedings, will reach you in due course, but it will take some time to put it into print.

The success of the Conference depends not merely on the discussion and the resolutions adopted, but the extent to which the resolutions are made effective in practice.

Very sincerely yours,

JULIUS HENRY COHEN,
Secretary.

CONFERENCE OF BAR ASSOCIATION DELEGATES,

CLEVELAND, O., AUGUST 27, 1918.

RESOLUTION PLEDGING SUPPORT TO WAR WORK.

RESOLVED: That the delegates from State and Local Bar Associations assembled in conference to-day do solemnly pledge themselves to renewed service to the nation in all the fields of war activity where the knowledge and experience of the lawyer especially qualify him; that we particularly pledge ourselves to the President, the Secretary of War and the Provost Marshal-General to man Local Exemption and District Boards for the important and additional labors they are about to be called upon to perform in securing the additional military forces necessary to win the war; and, finally, we call upon all lawyers throughout the country not already engaged in war activity to put themselves into immediate communication either with the Committee on War Service of the American Bar Association or with their respective local organizations of the

bar or the Legal Advisory Boards of their district under the Selective Service Law and Regulations, to the end that every lawyer in the country shall be selected for service at home or abroad in the position or work for which he is fitted.

Resolution Relating to Gratuitous Services to Registrants under the Selective Service Law.

The delegates are impressed with the thought that the bar of the United States in its several communities should welcome as a patriotic and loyal duty and should cheerfully assume the obligation to render gratuitously to registrants under the Selective Service Law professional services contemplated by the Selective Service Law and Regulations for which the members of the bar are especially qualified by reason of their professional equipment and experience, and when services of a generally similar nature are rendered to men in the service members of the bar should consider it a patriotic privilege to give their advice and professional aid without compensation, but we recognize that there may be extraordinary situations of business and legal complexity to which these observations do not apply.

Resolution Relating to the Prevention of Unnecessary Litigation.

Resolved, That the Conference of Delegates of the American Bar Association and of State and local bar associations hereby recommends that the various State and local bar associations of the United States co-operate with individuals, State and local Chambers of Commerce and other organizations in the prevention of unnecessary litigation along the following lines:

1. By issuing suitable literature and providing suitable speakers to address business organizations.
2. By emphasizing the importance of clients consulting counsel freely before the facts upon which a dispute can arise have become fixed.
3. By encouraging lawyers and laymen to co-operate in the preparation of the best possible legal instruments.
4. By encouraging and by making known the fact that they are encouraging the settlement of disputes out of court as far as practical, and
5. By urging the bar and business men generally to pull together in each locality for the prevention of unnecessary litigation.

And, in so doing it is further recommended that the work of the various State and local bar associations be, so far as practical, coordinated and standardized, and that a special committee of five be appointed for that purpose.

That a copy of the Rules for the Prevention of Unnecessary Litigation, referred to by Mr. Remsen, and a transcript of his ad-

dress and that of Mr. Bernheimer be sent out by this Conference, or by the American Bar Association, to all bar association presidents and secretaries in the country and to all Chambers of Commerce or similar boards, in order that the suggestions therein contained may be brought to the attention of those bodies.

Note: Copies of these pamphlets can be obtained from Julius Henry Cohen, Esq., 111 Broadway, New York City.

Resolution Calling for Reports from State and Local Bar Associations to the Secretary.

On motion of Mr. Storey, it was voted to request the various State and local bar associations of the country to send in reports to the Secretary of the Conference, and that a summary of such reports be submitted by the Secretary at the annual meetings of the American Bar Association.

Resolution with Regard to Contingent Fees.

That the time has come for the members of the American Bar in their respective states to reconsider the basis for the existing law upon the subject of contingent fees, and to consider whether all contingent fees should not by law be made subject to summary review by a court on the application of the client.

Note: There seems to be no occasion for reconsidering this subject in Massachusetts as the law as to contingent fees is clear and so far as practice is concerned it is covered by Canon XIII of the Canons of Ethics.

F. W. G.

THE PROPOSED ACT OF CONGRESS RELATIVE TO THE POWERS OF FEDERAL JUDGES IN CHARGING JURIES.

The following proposal was submitted to Congress on January 19, by Mr. Caraway of Arkansas, being an amended form of a bill introduced by him in April, 1917.

The bill, No. 9354, as now pending before Congress, is as follows:

"A BILL

"To amend the practice and procedure in federal courts, and for other purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That hereafter in any cause pending in any United States court, triable by jury, in which the jury has been impaneled to try the issue of facts, it shall be reversible error for the judge presiding in said court to express his personal opinion as to the credibility of witnesses or the weight of testimony involved in said issue: *Provided,* That nothing herein contained shall prevent the court directing a verdict when the same may be required or permitted as a matter of law.

"SEC. 2. That the judge of the court on the issue of law involved in said cause shall be required to deliver his charge to the jury after the introduction of testimony and before the argument of counsel on either side, and where requested by either party said charge shall be reduced to writing: *Provided, however,* That in United States courts sitting in states in which the law permits the trial judge to deliver his charge after argument of counsel, such procedure and practice may be followed by the trial judges in United States courts sitting in such states."

Somewhat similar suggestions have been proposed to Congress several times at sessions during the past few years. They have been opposed by the standing committee which suggests remedies and proposes laws relative to procedure, of

the American Bar Association, with the approval of the Association at several of its meetings.

The proposed bill No. 9354, quoted above, was again discussed at the meeting of the American Bar Association at Cleveland, in August, 1918, and the Association voted again to oppose the bill. A brief statement of the argument against the bill submitted to the House of Representatives by the standing committee of the American Bar Association, above referred to, is printed in the report of that committee in the "American Bar Association Journal" for July, 1918, pages 504-512.

It is a proposal to change the common law powers of the federal judges in connection with jury trials, which have been unimpaired for more than a century during the entire existence of the federal courts in such a way that the case, in its ultimate presentation to the jury, shall be more in the control of the strong counsel on one side or the other than it is to-day.

It is a proposal that the only trained mind in the court room which has any reason to be impartial from the nature of its position, its responsibility, its training and its function, shall be tied down by some more rules.

The Federal practice leaves the judge free to act in accordance with the principles of law and his own responsible sense of the impartial and solemn nature of a function which he is appointed and paid to perform.

The proposed act would interfere with the proper performance of this function and would lessen the judge's own sense of the importance and responsible character of his work.

It seems obviously desirable in the interest of justice that the judge on the bench at a jury trial should be intellectually and morally the equal of the strongest counsel who appears before him on one side or the other, and that he should be given free opportunity to do his part in securing justice and should neither be overawed by the position or personality of the strongest advocate at the bar, nor be so tied down by petty legislative rules based upon prejudice and distrust that he is placed at a disadvantage in dealing with vigorous and unfair tactics on the part of counsel on one side or the other in the desire to control, not only the jury but the judge and the entire result of the proceedings.

It is to be hoped that Congress will not attempt to weaken the federal judges by the proposed act on the theory that jury trials in the United States ought to be more under the control of partisan advocates.

The late James B. Thayer, who was probably better informed on this subject than any other member of the American Bar, said:

> "It is not too much to say of any period in all English history that it is impossible to conceive of trial by jury as existing in a form which would withhold from the jury the assistance of the court in dealing with the facts. Trial by jury in such form as that is not a trial by jury in any historical sense of the word. It is not the venerated institution which attracted the praise of Blackstone and of our ancestors, but something novel, modern, and much less to be respected." (Prelim. Treatise on Evidence, 188, note.)

In Capital Traction Co. *v.* Hoff, 174 U.S. 1 at p. 14, the Supreme Court of the United States said:

> "Trial by jury in the primary and usual sense of the term in the common law and in the American Constitutions . . . is a trial by a jury of twelve men in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts."*

Under this clear statement of the meaning of "trial by jury" under the Seventh Amendment to the Constitution of the United States, it does not appear to be within the legislative powers of Congress to dictate the nature of a jury trial and the manner in which judges shall perform their constitutional function. Those subjects are placed by the Constitution in the control of the judiciary which derives its powers directly from that instrument.

An account of the legislative history of the Massachusetts Statute relative to charging juries will be found in 1 Mass. Law Quarterly, 76-78. The constitutionality of this act has

*See also Vicksburg, etc., Co. *v.* Putnam, 118 U.S. 545, 553; Simmons *v.* U. S. 142 U.S. 148, 155; U. S. *v.* Phil., etc., Co. 123 U.S. 113, 114, cited by Thayer.

never been tested and the recent decision of the Supreme Court of the United States in declaring illegal the practice of sixty years' standing or more of the federal courts in regard to probation is a fresh demonstration of the fact that mere lapse of time does not render an illegal practice legal.*

In Massachusetts, the constitutional provision guaranteeing the "right to a trial by jury" in Article XV. of the Bill of Rights must be read together with the provision in Article XXIX. of the Bill of Rights, that "It is the right of every citizen to be *tried by judges*, as free, impartial, and independent as the lot of humanity will admit."

Aside from authority, the important consideration, in these days when constitutional principles and authorities are being so closely analyzed as to their essential soundness and scope, is to get at the inherent practical meaning of the words, "the judicial power of the United States" which is "vested" directly, by Section 1 of the third article of the Federal Constitution, in the Supreme Court and in "such inferior courts as congress may from time to time ordain and establish." It is submitted that those words do not confer upon Congress the right to dictate whether or not a judge at a jury trial shall exercise those reasonable powers naturally contained in the practical meaning of the words "judicial power."

The ablest and most recent written argument in favor of the proposed statute appears to be one by Ashley Cockrill, Esq., of Little Rock, Arkansas, the one member of the Executive Committee of the American Bar Association to support the proposed statute and the man who led in the argument in favor of the statute at the meeting of the Association at Cleveland, above referred to. Prior to that meeting, he prepared and sent to a number of members of the Association an extended brief on the subject.

In this brief, he takes up the constitutional questions and endeavors to answer them. He states that trial by jury in the Federal Constitution means the preservation of the essential elements of a jury trial at common law at the time of the adoption of the Constitution. He refers to the passage quoted from the opinion in Capital Traction Co. *v.* Hoff as a dictum and states that the essential and substantial elements of a jury trial have been "number, unanimity and

*See *ex parte* United States, Petitioner 242 U.S. 27 and comment on this case in II. MASSACHUSETTS LAW QUARTERLY, 591.

impartiality," and quotes text books to the effect that the right is subject to "legislative control to an extent not easily definable in advance." He then says, "Of course another, and perhaps the first essential, is that a judge should preside" and that "No court has yet held that to limit the common law powers of the judge over the facts is unconstitutional." He quotes a number of distinguished members of the bar to the effect that it is bad practice for the judge to "thrust upon the jury his opinion on questions of fact." He also quotes various passages from opinions of the Supreme Court of the United States, as if they modified the statement contained in the unanimous opinion of the court written by Judge Gray, and already quoted, in Capital Traction Co. *v.* Hoff. Mr. Cockrill's use of these passages calls for examination.

In the first place, he quotes the following passage from the opinion of Chief Justice Taney in Mitchell *v.* Harmony, 13 How (U.S.) 420 (1851).

> "The practice in this respect differs in different states. In some of them the court neither sums up the evidence in a charge to the jury nor expresses an opinion upon a question of fact. Its charge is strictly confined to question of law, leaving the evidence to be discussed by counsel, and the facts to be decided by the jury without commentary or opinion by the court. But in most of the states the practice is otherwise; and they have adopted the usages of the English courts of justice, where the judge always sums up the evidence, and points out the conclusions which in his opinion ought to be drawn from it; submitting them, however, to the consideration and judgment of the jury.
>
> "It is not necessary to inquire which of these modes of proceeding most conduces to the purposes of justice. It is sufficient to say that either of them may be adopted under the laws of Congress. And it is desirable that the practice in the courts of the United States should conform, as nearly as practicable, to that of the state in which they are sitting, that mode of proceeding is perhaps to be preferred, which, from long-established usage, practice, has become the law of the courts of the State."

As to this passage, the first thing to be noted is that the passage recognizes the right of the Federal Judge to exercise his discretion under the circumstances as to the nature and extent of the advice which the interests of justice call upon him to give to the jury for their assistance.

Mr. Cockrill neglects to quote the most important passage relating to this matter, a passage which has a very important bearing on the Constitutional question. Chief Justice Taney said:

> "The right of a court of the United States to express its opinion upon the facts in a charge to the jury was affirmed by this Court in the case of M'Lanahan *v.* The Universal Insurance Co. 1 Pet. 182, and Games *v.* Stiles, 14 Pet. 322. Nor can it be objected to upon the ground that the reasoning and opinion of the court upon the evidence may have an undue and improper influence on the minds and judgment of the jury, for an objection of that kind questions their intelligence and independence; questions which cannot be brought into doubt without taking from that tribunal the confidence and respect which so justly belong to it in questions of fact."

This passage refers to an essential element of a jury trial which cannot be ignored and which has not received sufficient consideration in the discussions of this subject hitherto.

Mr. Cockrill then refers to the cases of Nudd *v.* Burrows, 91 U.S. 426 and Indianapolis R. R. Co. *v.* Horst, 93 U.S. 291, in which the court again refers to the Act of Congress in 1872, requiring practice, pleadings and forms and modes of proceeding in civil causes at law in the Federal Courts to conform, as near as may be, to the state practice, and commends the Act as an effort to bring about uniformity of procedure in the state and federal courts of the same locality, but it is expressly decided in the opinion delivered by Mr. Justice Swayne that the "personal conduct and administration of the judge" as to the mode of submitting the case to the jury were not within the statute, and that how far the legislative department could impair the judge's freedom in the exercise of his powers and dictate the manner of their exercise, were interesting questions not necessary to be considered.

Mr. Cockrill then refers to the address of Hon. Henry B. Brown, then a Federal judge and later justice of the Supreme Court of the United States, before the American Bar Association in 1889, which appears in the twelfth volume of the Reports of the Association, p. 265. Judge Brown discussed the common tendency throughout the country to weaken the powers of federal judges and throw the case before the jury into the hands of the stronger advocate on one side or the other, and suggested to the bar that many of the legislative restrictions which he referred to were open to question as to their constitutionality. Mr. Cockrill says that Judge Brown "did not seem to be very vigorously opposed to the scheme proposed by this bill," and refers to the passage in which Judge Brown said, "perhaps in the universal acquiescence of the courts, it may be presumptuous to question the validity of these enactments."

Any one who reads Judge Brown's address carefully, however, will see very clearly that he was urging seriously upon the bar the consideration and discussion of these constitutional questions, and in his address he pointed out many of the objections which are referred to in this note. It was natural, in view of the fact that Judge Brown himself, was then a judge of the Federal Court (prior to his elevation to the Supreme Bench) that the tone of his address should be persuasive rather than vigorously controversial, as his object was to interest the minds of the bar, many of whom might disagree with him, in a more careful study of these questions. Accordingly, while he did use the diplomatic phrase "It may be presumptuous to question the validity of these enactments," he nevertheless accepted the intellectual and professional responsibility of his position and proceeded to question them very seriously in the same sentence by saying, "Yet, there is reason for saying that some of them, at least, are encroachments upon the independence of the judiciary."

Furthermore Judge Brown had become a member of the Supreme Court nine years later when Capital Traction Co. *v.* Hoff was decided and he joined in Judge Gray's opinion already quoted. He evidently felt that the judiciary of the country was being gradually weakened in such a way as to lead to very serious results in future if the process was not checked. He was particularly emphatic in doubting "the

constitutionality of laws requiring the judge to deliver his instructions to the jury in writing," saying that "If the judge can be compelled to stop the progress of a trial, to write out a charge which may occupy an hour or two in delivery, it is impossible to say wherein his freedom of action is not subject to the control of the legislature."

Of course as he said, "Every word that falls from the judge's lips during the trial is public property" and, with the present use of stenographers, there is no difficulty in preserving it as public property for such comment as counsel may see fit to make upon it.

But, now that a movement is on foot to extend the weakening process to the powers of the Federal Courts and, because of the restrictive statutes in many states, to urge Congress to weaken the Federal Judges throughout the country, it is time, not merely for persuasive addresses, but for vigorous controversy and, unless the bar is to surrender its intellectual standards and professional responsibilities, it cannot be considered "presumptuous" to question the constitutionality of the proposed legislation or of the legislation which has been in existence in some states, including that of Massachusetts.

It is submitted that the latest statement of the Supreme Court of the United States, in the opinion of Judge Gray in Capital Traction Co. *v.* Hoff, and the passage already quoted from Prof. James B. Thayer are the most authorative statements of the nature of a jury trial at common law which we have from men who were thorough students of the history of that institution. It is clear from the opinions referred to by Thayer in his note that at the time when American Courts developed their highest reputation for ability, there was no question of the common law power of the judge to assist the jury, when he thought the circumstances of the case required it, by expressing his opinion in regard to the bearing of the facts and of the evidence so long as he was careful, as all competent judges should be, to make it clear to the jury that he was merely endeavoring to assist them in their deliberations and not to dictate the nature of their judgment. And, to quote from the preliminary report on "Efficiency in the Administration of Justice" issued by the National Economic League a few years ago,—

> "If we cannot provide a type of judge adequate to the demands of judicial office, we must not expect the administration of justice to be efficient. Our sole resource for correcting bad verdicts is what has been called the 'monstrous penalty of a new trial.' "

It is to be hoped that members of the bar throughout the country will reconsider their views of the essential elements of a constitutional jury trial and of the natural and inherent characteristics of "the judicial power" which is directly vested by the Third Article of the Federal Constitution, not only in the Supreme Court of the United States, but in the other federal tribunals.

It is submitted with confidence that the statement by Mr. Cockrill that the "Supreme Court of the United States alone of the Federal Courts possesses jurisdiction derived immediately from the Constitution, of which the legislative power cannot deprive it," and that "—other Federal Courts derive their power from Congress alone;" and that "—Congress is, therefore, all-powerful over all Federal Courts, excepting the Supreme Court" is erroneous. Under Sec. 1 of Art. III., the power of Congress is to "ordain and establish such inferior courts" as it may see fit, but Congress cannot impair "the judicial power" which is "vested . . . in such inferior courts" directly by the Constitution if and when they are so established.

It should also be remembered that, under the Judiciary Act, a judge of the Supreme Court of the United States is assigned to each of the nine judicial circuits of the country and has a right to sit, not only upon the Circuit Court of Appeals but, if he sees fit to do so, to preside at jury trials on the District Bench. The fact that the judges of the Supreme Court are too busy with appellate work to perform this function does not alter the fact that it is within their power, and it is inconceivable that one judge who has a right to sit at jury trials in Federal Court has more power than any other judge who is appointed to perform the same functions. Even Mr. Cockrill will admit that Congress cannot tell the judges of the Supreme Court of the United States how they shall perform their functions in whatever capacity they may sit in any of the Federal Courts. Every judge of

the United States is clothed directly by the Constitution with all "the judicial power" appropriate to the function which he is to perform.

The policy of the Judiciary Act was carefully explained by Judge Swayne in Indianapolis R. R. Co. *v.* Horst, 93 U.S. Referring to the conformity to state practice required by the Act, he said:

> "The conformity is required to be 'as near as may be,' not as near as may be possible, or as near as may be practicable. This indefiniteness may have been suggested by a purpose; it devolved upon the judges to be affected the duty of construing and deciding, and gave them the power to reject, as Congress doubtless expected they would do, any subordinate provision in such state statutes which, in their judgment, would unwisely incumber the administration of the law, or tend to defeat the ends of justice, in their tribunals.
>
> "While the Act of Congress is to a large extent mandatory, it is also to some extent only directory and advisory."

The proposed Act would depart from this policy.

Referring again to the passage already quoted from Chief Justice Taney, the objection to the power of a judge to express his opinion of the facts "questions the intelligence and the independence" of American juries "which cannot be brought into doubt without taking from that tribunal the confidence and respect which so justly belong to it in questions of fact."

Is the Congress of the United States ready to pass an act which assumes that American juries in the Federal Courts have not the intellect, character, and courage to disagree with the judge when he expresses his opinion upon the facts for their assistance, when he is the only other man in the court room, besides themselves, who is supposed to be impartial and when they can be trusted to disagree with the most powerful advocate at the bar on one side or the other who may appeal to their emotions with all the force of his personality, his rhetoric, his skill, and perhaps his trickery in argument?

If American juries have come to such a pass that they cannot be trusted to listen to a judge in the way that any other body of men outside of the court room, called upon to decide important questions, would listen, and would expect and be expected to be allowed to listen, to a man of long experience whose business it was to advise them, then, surely this modern conception of a jury is, as Prof. Thayer has said in the passage quoted, "something modern, novel and much less to be respected" than the common-law jury trial.

F. W. GRINNELL.

NOTE ON THE POINT OF VIEW OF A LAYMAN.

The more one considers the discussions of this subject by lawyers, the more one is impressed by the fact that the point of view of the jury and the right of the parties to the best informed and considered judgment of the jury, seems to be almost entirely ignored. But the bar has no monopoly of ideas on the matter. I talked with a friend of mine, a few years ago, just after he had served as a juryman for five or six weeks. He said:

> "The thing that we could not understand on the jury with which I sat was why the judge did not talk to us more about the facts and the evidence. We knew that he must have some ideas on the subject and, naturally, we should have liked to hear what those ideas were so that we could consider them. That is what we would have wanted in making up our minds about anything outside of the court room and we could not understand why we should not be treated in the same way inside of the court room and given such assistance as the judge might be able to give us. There he was, sitting up on the bench all through the trial, listening to the case with us for the purpose of doing justice and, yet, he was the only man who did not talk at all about the case in any practical way." My friend added, "I don't know what you lawyers think about it, but I know what I think of such a situation."

Would not every level-headed man, who was not a lawyer, say the same thing? Would any self respecting American juryman like to be told frankly, in so many words, that although he might be flattered, to the top of his bent, by counsel skilled in that form of argument known as "bootlicking the jury," he was not fit to be trusted to listen to a direct statement of the judge's views delivered without flattery? That there may be occasional abuses by judges in the exercise of this power, as there are of every power exercised by human beings, is undoubtedly true; but that the substantial interests of justice in the Federal courts, as a rule, throughout the country suffer, as compared with the state courts, is certainly not true in the prevailing opinion of the American bar.

F. W. G.

THE PROPOSED ACT OF CONGRESS RELATIVE TO SALARIES OF FEDERAL JUDGES.

There is a bill pending before Congress to revise the system of salaries of the judges of the Federal Courts and of the Circuit Courts of Appeal, adjusting the scale of such salaries to the relative amount of work in the different federal districts of the country, in place of the existing arbitrary determination without relation to the business done in the different districts.

A committee of the New York Bar, consisting of Hon. Charles E. Hughes, Hon. Alton B. Parker, Hon. Lindley M. Garrison, and others, has been selected to support this bill before Congresss in co-operation with members of the bar from different parts of the country, and this Association has been requested to appoint a committee to co-operate in such support. The Executive Committee recommends the support of the bill and the appointment by the President of such a committee.

The Substance of the Bill.

The proposed changes in the salaries of the Federal Judges are to increase the minimum salary of a district judge from $6,000 to $6,500 and to provide that in districts having a population of over 500,000 district judges shall receive additional compensation at the rate of $500 for each one-half million of population, or part thereof, in their respective districts in excess of the first 500,000, but that no salary of any district judge shall at any time exceed $10,000 a year.

It also provides that: The judges of the Circuit Court of Appeals shall receive a salary equal to $1,000 in excess of the highest salary paid to any district judge in the judicial district for which such circuit judge shall be appointed, but that at no time shall the salary of any circuit judge exceed the sum of $11,000 a year.

F. W. G.

PAYMENTS UNDER PROTEST BY POLICY HOLDERS TO LIFE INSURANCE COMPANIES CONSIDERED UNDER THE BROADER ASPECTS OF THE PRINCIPLES OF QUASI-CONTRACT.

A is a policy holder in the B Life Insurance Company hereinafter styled B company. B company acting in good faith demands from time to time that A pay it certain sums of money as premiums or assessments due under A's policy. A having full knowledge of the terms of the policy disputes the company's contention that such sums are due thereunder, but each time pays under written protest the amount demanded. As matter of law B company's construction of the policy is incorrect, and no legal obligation exists for A to pay the sums demanded. After A has made a certain number of payments under protest, he brings suit against B company to recover the amount of the sums so demanded and received by the latter. Judgment for whom?

1. The Case on the Authorities.

The above case is not a mere academic question, but a point which has twice been passed upon by the supreme judicial court within the last three years. Each time the court determined that A cannot recover back from B company money which the company collected under claim of right as a premium (Rosenfeld *v.* Boston Mutual Life Insurance Company, 1915, 222 Mass. 284, 289 *et seq.*; Richards *v.* Security Mutual Insurance Company, 1918, 230 Mass. 320). In both these cases A paid under protest the premium demanded.

The opinion in the Richards case contains no reasoning on this point, but simply says that the principle of law is settled by the Rosenfeld case. The Rosenfeld case, also, merely calls attention to the fact that (p. 289) "it is a familiar principle of law that, unless otherwise provided by statute, where a person with full knowledge of all the circumstances pays money voluntarily to another without fraud, compulsion or duress, such money cannot be recovered back although no obligation to make such payments existed. . . . It is well settled that a party who has paid a demand voluntarily under a

claim of right cannot afterwards recover back the money, although he protests at the time against his liability and declares that he makes the payment under coercion (Forbes *v.* Appleton, 5 Cush. 115)." What is the reason of the rule, the court does not discuss.

It is unfortunate that the point at issue herein was not argued by either party to the Rosenfeld case as will appear by an examination of the papers.

In view of the fact that the matter was not fully argued, the rule, or at least its application to life insurance payments, seems worthy of discussion for its consideration in future by the bar, the court, and the legislature.

2. Defining the Issue.

In the first place without discussing what constitutes duress, it seems that this is not a case where the payment is made under duress as the courts define that term in suits to recover money paid thereunder. In the sense, then, that the money has not been paid under duress, A is a volunteer. He is not a volunteer, however, in the sense that the word is used to describe the man who pays money or delivers goods to B who has no desire to deal with A or become his debtor, as in Boston Ice Company *v.* Potter, 1877, 123 Mass. 28; or the one, who by mistake of law without any obligation upon him so to do and without any request on the part of B, pays to C the debts owed him by B, as in Whiting *v.* Aldrich, 1875, 117 Mass. 582; or the one who of his own volition and without any request on the part of B, though with the latter's knowledge and consent, makes a payment to B as in West Springfield and Agawam Street Railway Company *v.* Bodurtha, 1902, 181 Mass. 583. In other words, A is not forcing himself or his payments upon B. Quite to the contrary.

Again it is true that A is not making his payments under mistake of fact, whether negligent or otherwise, so he may not recover under the beneficent ruling either of Blanchard *v.* Low, 1895, 164 Mass. 118, cited in the Rosenfeld case, or even under the wider and more equitable doctrine of Appleton Bank *v.* McGilvray, 1855, 4 Gray, 518, 522.

But A's case may no longer be dismissed merely by citing the maxim that money paid under mistake of law cannot be

recovered, because as set forth in Reggio *v.* Warren, 1911, 207 Mass. 525, 533 *et seq.*, this rule is not invariably to be applied. In the words of the opinion of that case (p. 534): "So it has been said that the important question was not whether the mistake was one of law or of fact, but whether the particular mistake was such as a court of equity will correct, and this depends upon whether the case falls within the fundamental principle of equity that no one shall be allowed to enrich himself unjustly at the expense of another by reason of an innocent mistake of law or of fact entertained by both parties."* It is true that in our case, there was no mistake of law entertained by both parties, that it was entertained only by B company, the payee. The question then arises why A should be put in a worse position as regards the payment of money demanded by B company under mistake of law, because he pays it, not sharing with B company the latter's error, but reluctantly, with his eyes open, and under genuine and express protest.

3. Discussion of Precedents Cited in Rosenfeld Case.

In support of the ruling that under the circumstances of the case A should not be allowed to recover from B company, the opinion in the Rosenfeld case cites seven precedents which are here set forth in their chronological order, together with such quotations from the respective opinions as bear on our case.

(a) *Hill* v. *Green*, 1826, 4 Pick. 114. B had brought suit against C to recover some stags which B claimed to belong to him and which A, to whom B had delivered them under contract of sale, had sold to Livermore, in turn C's vendor. Livermore having become satisfied that B would hold the stags, paid B their value, apparently relying on A to be reimbursed; A sues B on a contract for money had and received; the court says, p. 116: "The count for money had and received was not sustained by the evidence, because, if the contract was not rescinded, the property in the chattels was in the plaintiff; his transfer to Livermore was valid, and the yielding by Livermore to the defendant's demand [Liver-

*For an excellent discussion of the subject of the recovery of money paid under mistake of law see Woodward's "The Law of Quasi-Contracts," Boston, 1913, Chapter 3.

more knowing the facts] would give him no right of action against the plaintiff, and neither Livermore nor the plaintiff could maintain an action against the defendant for the money paid by Livermore."

(b) *Forbes* v. *Appleton*, 1849, 5 Cush. 115. B was threatening to libel A's ship for money alleged to be owed B by A, whereupon A under protest paid B the amount demanded, and then brings an action of assumpsit to recover the same. The Court spends a good deal of its time discussing whether the payment was made under duress, which it decides was not the case, whereupon it finds for B. Dewey, J., p. 117: "The principle of law is a very familiar and a very salutary one, that where a person, with full knowledge of all the circumstances, pays money voluntarily, under a claim of right, he shall not afterwards recover back the money so paid. . . . (P. 118): The mere declaration of the party making the payment, that he does it under coercion, and with denial of the right of the other party to recover the same, will not avail. If he has a good defence to the claim, he should resist it in the outset. If he does not, he waives his right to litigate the matter further."

(c) *Benson* v. *Monroe*, 1851, 7 Cush. 125. A sues in assumpsit to recover fee paid public official demanded under statute now admitted to have been unconstitutional. A had paid the fee under protest and in order to release his ship from attachment placed upon it in suit brought to recover a penalty for violation of the statute. Judgment for defendant. Metcalf, J., says on page 131 that where the money has been paid to settle an unjust claim, made in good faith, attempted to be enforced by legal proceedings, the plaintiff "has an opportunity, in the first instance, to contest the claim at law. He has, or may have, a day in court; he may plead and make proof that the claim on him is such as he is not bound to pay. . . . As was said by Gibbs, J., in Brisbane *v.* Dacres, 5 Taunt. 152, the party has an option, whether to litigate the question, or submit to the demand and pay the money." He also cites an English case, Brown *v.* McKinally, 1 Esq. R. 279, where Lord Kenyon said that to allow A to recover from B money paid under protest to settle a suit brought by B against A "would be to try every question twice; that the same legal ground, which would entitle the

plaintiff to recover in that suit, would have been a good defence to the suit brought against him by the defendant; and that the plaintiff should have made his defence to that suit."

(d) *Lee* v. *Inhabitants of Templeton*, 1859, 13 Gray, 476. This was an action of contract to recover taxes paid under protest. The court discusses the question merely whether the payments were or were not voluntary. Having decided that they were voluntary, it holds, without more, that they cannot be recovered.

(e) *Regan* v. *Baldwin*, 1879, 126 Mass. 485. Contract to recover rent paid by lessee under protest to lessor on the latter's demand, during time premises were rendered unfit to use by fire, when lease contained usual clause that under such circumstances the rent or a just and proportionate part thereof should be abated. Defendant's demurrer sustained; judgment for defendant affirmed. Lord, J., p. 487: ". . . the limitation has come to be fixed that a party may in equity and good conscience continue to hold money voluntarily paid to him under no mistake of fact, and without fraud on his part. This rule was established in Brisbane *v.* Dacres, 5 Taunt. 143, and from that time recognized and followed. It was distinctly recognized by Chief Justice Shaw in Bacon *v.* Bacon, 17 Pick. 134. . . . The fact that the plaintiff in this case might have been under embarrassment as to the amount of rent which he should withhold or which he might properly claim to rebate, does not affect the principle. It was his right to litigate that question with his lessor, and his election to pay the full amount rather than to resist the payment of any portion of it makes the payment a voluntary one."

(f) *Taber* v. *New Bedford*, 1900, 177 Mass. 197. Plaintiff paid money to city treasurer as a fee for a liquor license, with the request that it be returned if the licensing board, which had granted him the license, be thereafter removed as illegally constituted. The board was thereafter removed, and plaintiff sues for money had and received. Holmes, C. J., says that plaintiff's mistake in thinking he could get back his money was one of law, and that anyhow he got something for his money, as his license was good till the board was removed. Judgment for defendant.

(g) *Brown* v. *Inhabitants of Nahant,* 1913, 213 Mass. 271. Contract to recover from the town of Nahant, money paid in the years 1904, 1905, and 1906, for license to sell liquors in what turned out to have been a federal reservation. Plaintiff sold liquor under his license up to November, 1906, when the federal government caused him to quit. Held: the defendant received no money from the plaintiff, as the town treasurer received the fee as a public officer and not as town agent, and that the selectmen as licensing board acted as public officers, and not as town agents. Further the plaintiff had enjoyed the benefit of his license. Nothing is said in the decision about money paid under mistake of law.

It will be noted that of the above seven cases relied on in the Rosenfeld case, the last two, Taber *v.* New Bedford and Brown *v.* Nahant, did not present a case of money paid on demand under protest, but of money paid voluntarily in every sense of the word, for consideration received. Furthermore these same cases and two of the five others, Hill *v.* Green and Lee *v.* Templeton, contain no discussion whatsoever explaining the reason of the principle for which they are cited as authorities. Two of the remaining three cases, Forbes *v.* Appleton and Benson *v.* Monroe, which lay down the principle as law, merely give as reason therefor, the similar proposition that if A is threatened with suit he must resist at the outset or else waive all right to dispute the claim. Is this not rather begging the question, as no reason is given why the only option given to A is to fight or pay? That otherwise the result would be to try every question twice, as hinted in the English case of Brown *v.* McKinally, cited in Benson *v.* Monroe, would not be true unless, as in Benson *v.* Monroe, suit had actually been begun by B against A, on which ground the latter case may be distinguished.

Regan *v.* Baldwin presents a state of facts more analogous than any of the other cases above cited to the Rosenfeld case, as in Regan *v.* Baldwin, B, the lessor, does not appear to have brought or even to have threatened suit. A paid the rent demanded in order, as he says, to save his estate and business which probably means that he was afraid B would enter and declare the lease terminated for non-payment of rent. Regan *v.* Baldwin is also noteworthy for putting its decision on equitable grounds, namely "that a party may in

equity and good conscience continue to hold money voluntarily paid to him under no mistake of fact and without fraud on his part." This brings the case back to Reggio *v.* Warren, *supra,* and the question before asked. Why is it equitable for B to retain money paid to him by A under protest on B's demand made under mistake of law, when it is not equitable for B to retain the money that A has freely paid him because A has shared with B the latter's mistake of law? Is it not true that in both cases B is unjustly enriched?

4. Other Authorities.

In the effort to answer the question fairly, it might be well to give the reasons which have been offered in other Massachusetts cases, and in the English case on which they principally rely, to show why it is in accordance with good conscience for B so to retain the money paid him under such circumstances. Although there are many Massachusetts cases where the principle has been laid down that, in the absence of fraud or duress, money paid under protest with full knowledge of the facts may not be recovered from the payee, the reasons for such principle apparently have been discussed in only two cases, outside of those referred to above, namely in Preston *v.* Boston, 1831, 12 Pick. 7 and Boston & Sandwich Glass Company *v.* Boston, 1842, 4 Met. 181.*

In both of these last named cases A was attempting to recover taxes paid under protest, and in both the plaintiff is allowed to recover on the ground that he did not pay voluntarily but under duress. In Preston *v.* Boston, Shaw, C.J., says on page 13: "The only remaining question is, whether this money was paid voluntarily, or under duress. A party

*Excluding the cases heretofore cited in the text, the following are cases noted as occurring in Massachusetts Reports, Vols. 1-228, inclusive, which hold or say that A may not recover from B money paid to him by A with full knowledge of the facts, and not under duress, in response to a demand or claim of right by B made in good faith, even though A could successfully have resisted such demand, or though B was not legally entitled to the money. Bacon *v.* Bacon, 1835, 17 Pick. 134; People's Mutual Equitable Fire Insurance Company, petitioners, 1864, 9 Allen, 319, 325-326, dictum; Cook *v.* Boston, 1864, 9 Allen, 393; Barrett *v.* Cambridge, 1865, 10 Allen, 48; Wilde *v.* Baker, 1867, 14 Allen, 349, 351; Emery *v.* Lowell, 1879, 127 Mass. 138; McGee *v.* Salem, 1889, 149 Mass. 238, 242, dictum; Alton *v.* First National Bank of Webster, 1892, 157 Mass. 341.

who has paid voluntarily under a claim of right, shall not afterwards recover back the money, although he protested at the time against his liability. The reason of this is obvious. The party making the demand may know the means of proving it, which he may afterwards lose; and because another course, would put it in the power of the other party, to choose his own time and opportunity, for commencing a suit (Brisbane *v.* Dacres, 5 Taunt. 143)." In Boston and Sandwich Glass Company *v.* Boston, Dewey, J., says on page 188: "The reason of the rule, and its propriety are quite obvious, when applied to a payment upon a mere demand for money, unaccompanied with any power or authority to enforce such demand except by a suit at law. In such case, if the party would resist an unjust demand, he must do so at the threshold. The parties treat with each other on equal terms, and if litigation is intended by the party of whom the money is demanded, it should precede payment. If it were not so, the effect would be to leave the party, who pays the money, the privilege of selecting his own time and convenience for litigation; delaying it, as the case may be, until the evidence which the other party would have relied upon to sustain his claim, may be lost by the lapse of time and the various casualties to which human affairs are exposed."

It will be noted that in both Benson *v.* Monroe, *supra*, and Preston *v.* Boston, the case of Brisbane *v.* Dacres, 1813, 5 Taunt. 143, is relied upon as a precedent. The material facts of that case are as follows: A, the captain of a ship of war, transported public money in 1808, for which service he received a fee from the public treasury. In accordance with the usage of the navy at that time, the admiral of the fleet was accustomed to receive as a legal right from the captain one third of such fee. B, A's admiral, demanded and received his third. There is no hint that A paid it under protest or that A did not share B's view of the latter's legal rights. In 1811, the case of Montague *v.* Janverin, 3 Taunton, 442, held that an admiral was not legally entitled to any part of the captain's fee under such circumstances, whereupon A sues B to recover the one-third paid him in 1808, in an action of assumpsit for money had and received. The judgment was for the defendant. Gibbs, J., in his opinion says on page 152: "We must take this payment to have

been made under a demand of right, and I think that where a man demands money of another as a matter of right, and that other, with a full knowledge of the facts upon which the demand is founded, has paid a sum, he never can recover back the sum he has so voluntarily paid. . . . I think that by submitting to the demand, he that pays the money *gives* it to the person to whom he pays it, and makes it his, and closes the transaction between them. He who receives it has a right to consider it as his without dispute; he spends it in confidence that it is his, and it would be most mischievous and unjust (p. 153) if he who has acquiesced in the right by such voluntary payment, should be at liberty, at any time within the statute of limitations, to rip up the matter, and recover back the money. He who received it is not in the same condition: he has spent it in the confidence it was his, and perhaps has no means of repayment." Mansfield, C.J., says on page 161: "If it was against his conscience to retain this money . . . an action might be maintained to recover it back, but I do not see how the retaining this is against his conscience . . . the officers of the navy . . . go on . . . the one to pay, and the other to receive . . . the admiral and captain each thinking that their rights continue as before, the admiral, that he has his accustomed right, the captain that it is his duty to pay the accustomed share, the one pays, and the other receives it. This then being so, the admiral doing no more than all admirals do, is it against his conscience for him to retain it? . . . So far from its being contrary to *aequum et bonum,* I think it would be most contrary to *aequum et bonum,* if he were obliged to repay it back. For see how it is! If the sum be large, it probably alters the habits of his life, he increases his expenses, he has spent it over and over again; perhaps he cannot repay it at all, or not without great distress; is he then, five years and eleven months after, to be called on to repay it?" *

*It will be noted that unless the Massachusetts courts would agree with Lord Mansfield in holding that it was in accord with equity and good conscience for the defendant to withhold the money in that he had not enriched himself unjustly at the plaintiff's expense, Brisbane *v.* Dacres would probably no longer be followed as a precedent, as the case would come within the principle above cited from Reggio *v.* Warren, 1911, 207 Mass. 525, 534, in that there was an innocent mistake of law entertained by both sides. No question of paying under protest presents itself.

5. Discussion of Principle as Applied to Our Case.

It will be seen, therefore, that only three reasons have been given for not allowing A to recover from B money which A had paid B under protest in response to B's claim of right based on mistake of law. (1), A should not be allowed to choose his time for litigating; (2), If litigation is delayed the evidence in B's favor may be lost; (3), B may have spent the money received from A, or otherwise in good faith changed his habits of life because of having been enriched by such payment.

The third reason, certainly, is no more available in the case under discussion than in the case where A has paid B under mistake of fact, or than in any case where equity considers that B has been unjustly enriched at A's expense. In fact it is less available to B as A has warned him that he considers the money paid not to belong to B, and that in due time he will seek to recover it from B.

As to the second reason, it may be said that in actions to recover money paid under protest, the facts are generally not in dispute, but rather their legal effect. The danger of the evidence in B's favor being lost through lapse of time would, moreover, be reduced to the minimum in our case where A, bringing an action against a life insurance company to recover alleged overcharges demanded as premiums or assessments by the company, relies in proving his case upon the terms of a policy prepared and printed by the defendant.

Finally, there is a particular reason in our case why A should be allowed to pick his time, within a reasonable period, for litigation. The reason is this: It may require more than one over-payment before litigation from A's viewpoint becomes financially feasible. This point is well illustrated by the Rosenfeld case. In that case the over-payments on a two thousand dollar policy extended over a period of nine years before the plaintiff brought his bill in equity to have the maximum legal rate determined, and the over-payments recovered. Even at that time, however, although the amount of overcharge was increased with each annual premium demanded, the total overcharge had reached the sum, at the date of bringing the bill, only to a little over two hundred dollars including interest, which amount had increased to something

over two hundred fifty dollars when the superior court made its final decree one year later.

It should be kept in mind that the option presented to A on each premium date is not to pay or *defend* a suit, but pay, *bring* a suit, or lose valuable rights in an insurance policy. The insurance company will not sue for the amount of the premiums. It will declare A's rights in the policy forfeited, diminished or changed, so far as by the terms of the policy, such rights are forfeited, diminished, or changed by A's failure to pay the required premium. The court indeed says in the Rosenfeld case that A has a fourth alternative (p. 290): "His rights under his policy would have been fully protected by paying or tendering the premiums as they became due" in accordance with A's construction of the policy which the court held correct. But surely no attorney could safely advise A that his rights would be so saved before the courts had actually passed on the questions involved under the disputed construction of the policy. The insurance company would refuse to accept such tender as payment, and unless the courts did finally uphold A's construction, he would be in as bad a position as though he had paid or tendered no premiums at all.

So, unless A may recover the overcharges paid under protest, his only alternative to dropping the policy or acceding in silence to the company's illegal demands, consists in bringing a bill in equity, when the first over-payment is demanded, to have the terms of the policy judicially construed. This costs money. The insurance company is practically certain to take the matter to the court of last resort. In the case of life insurance, how much the over-payments will eventually cost the policy holder he cannot definitely figure out as he never knows which premium will be his last. Therefore under the present state of the law he is forced into the position of figuring the certain cost of lengthy litigation against a benefit which, so far as the individual plaintiff is concerned, is highly problematical even though eventually he successfully sustains his contention as to the premium legally to be charged.

Ought such unfair alternatives to be presented to the policy holder of limited means? Ought he not to be allowed, without being held to have slept on his rights, to continue making payment under protest of the overcharges demanded, at least until the sum total at stake if the law allowed recovery of the

same, would be regarded as sufficient in amount to justify the ordinarily prudent man in bringing suit for recovery thereof?

6. Suggested Legislative Remedy.

Up to this point the discussion has been on the cases, the reasons set forth therein, and their lack of applicability to our facts. But let us suppose that there were no precedents, and the question arose anew. Is there much doubt that the man on the street, the lawyers, the judges, the insurance companies themselves, would hold in the present age that it was against conscience for B company to retain sums illegally demanded of its policy holders?

That it is not wrong for an insurance company voluntarily to return to policy holders who have paid an illegal assessment, the amounts paid thereunder by the respective individuals, even though such reimbursement required an assessment to be made against those policy holders who had not responded to the illegal demand, has been determined in the case of People's Mutual Equitable Fire Insurance Company, petitioners, 1864, 9 Allen, 319. This case can be justified only on the ground that it is inequitable for B to profit by A's voluntary response to B's illegal demand.

It would seem, therefore, that as matter of equity, A should be allowed to recover from B Life Insurance Company overcharges paid by him under protest. Since the courts of Massachusetts hold that under their decisions no such recovery may be allowed, a fair case seems to be presented for legislation.

The following act is suggested as a remedy.

Section 1. It shall not be a defence to an action or suit brought to recover money paid under written protest to an insurer at the latter's request as a premium, assessment or money otherwise due upon a written contract of life insurance where no obligation under such contract to make such payment existed, that such payment was made with full knowledge of the circumstances, without fraud or duress, or under mistake of law.

Section 2. This act shall take effect upon its passage but shall apply only to payments thereafter made.

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Note in Regard to the Proposal for Legislation.

Whether the remedy of legislation should be adopted seems a doubtful question for, if it is adopted, the question will arise whether it ought not to deal with the subject more broadly than with life insurance payments, as there are other cases where the element of compulsion by circumstances arising from the relation of the parties may throw undue risk upon a party as a result of his failure to pay money which he honestly believes he should not pay.

The situation differs somewhat from the recovery of taxes paid under protest where the element of compulsion arises out of the action of the government. If the principles of Quasi-Contract are to be applied in future to cases where there is an element of compulsion arising out of the relations of private persons, along the lines suggested by the foregoing article, is it not better that the matter should be left to the court so that the whole existing rule may be reconsidered when it comes up for application in the future? Is there any reason why the holder of a policy of insurance should be favored by legislation in this puzzling situation as compared with a party to some other kind of contract and, if not, as to what circumstances or kinds of contract should the existing rule be modified if at all? It is suggested that this is one of those questions where the development of the principle may better be left to the court in the light of fuller discussions in argument, or such articles as Mr. Rosenthal's, rather than that the situation should be dealt with by statute limited by an arbitrary line.

Even if such legislation should be considered the terms of such an act as is suggested by Mr. Rosenthal should be closely analyzed as to its effect.

F. W. G.